No. 06-16572

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: GRAND JURY SUBPOENA,
DATED JULY 19, 2006.

GREG FRANCIS ANDERSON,
Witness -Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from an Order of Civil Contempt of the
U.S. District Court for the Northern District of California
Honorable William H. Alsup

APPELLANT'S OPENING BRIEF

Mark J. Geragos (Bar No. 108325)
GERAGOS & GERAGOS
350 South Grand Avenue, 39th Floor
Los Angeles, California 90071-3480
Telephone (213) 625-3900
Facsimile (213) 625-1600

Counsel for Appellant
GREG FRANCIS ANDERSON

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FRAP 34(A)(1) STATEMENT REGARDING ORAL ARGUMENT

Appellant believes oral argument would be appropriate and useful for the disposition of this case. This appeal raises the important issue of whether witness Greg Anderson was afforded due process by the District Court in the hearing on whether he had just cause to refuse to testify to the grand jury.

I. JURISDICTIONAL STATEMENT AND BAIL STATUS

The district court had jurisdiction of Mr. Anderson's civil contempt hearing pursuant to 28 U.S.C. § 1826. The district court found Mr. Anderson in civil contempt on August 28, 2006, and remanded him to custody until he gives testimony, the grand jury expires, or 18 months passes, whichever comes first. (ER 103.) This Court has jurisdiction to hear this appeal. 28 U.S.C. § 1291, 28 U.S.C. § 1826. Appellant filed a timely notice of appeal on August 29, 2006. Fed. R. App. P. 4(b), ER 139. This appeal is from the final order of the district court of August 28, 2006 finding Greg Anderson in civil contempt and remanding him to custody.

Appellant has been in custody since August 28, 2006.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Greg Anderson was denied due process of law when the district court held him in civil contempt for refusing to testify before the grand jury, when the district court had not required the government to disclose to Mr. Anderson the "Paragraph 8" recording, and had not conducted a "taint" hearing.

2. Whether the government violated Mr. Anderson's plea agreement by attempting to compel him to testify, and whether the district court erred by not permitting Mr. Anderson to call witnesses on this issue.

3. Whether Mr. Anderson had just cause not to testify because his grand jury testimony was certain to be leaked in violation of Rule 6(e).

4. Whether the District Court denied Mr. Anderson due process by holding Mr. Anderson in contempt despite Mr. Anderson's compliance with the District Court's order of June 5, 2006 calling for a question-by-question determination of whether areas of grand jury inquiry were derived from the "Paragraph 8" recording.

5. Whether the District Court improperly relied on unreliable material not in evidence, including improperly taking judicial notice of the book *Game of Shadows*.

6. Whether the District Court's order confining Mr. Anderson is not coercive, but rather is impermissibly punitive.

III. SUMMARY OF ARGUMENT AND INTRODUCTION

Greg Anderson has been found in civil contempt and is currently sitting in a jail cell for refusing to follow a court order when in fact, the only thing he did was follow, exactly, the District Court's order to the letter. On July 5, the District Court told Anderson in ordering him to testify before the Grand Jury, in language that could not be any more clear and direct, that the court would address the so-called Paragraph 8 recording "taint" issue on a question-by-question basis, and that Anderson would be allowed to make a good-faith showing as to why he felt certain questions may have been derived from the recording. Based upon the clear and unmistakable meaning of the District Court's prior instructions, Anderson went into the grand jury room, answered over fifty (50) questions and only refused to answer those questions that he believed may have been based upon a surreptitious Paragraph 8 recording. Instead of bringing Anderson back to Court for a hearing on "taint" as directed by the district court, the Government instead sought to have Mr. Anderson held in contempt.

At the "just cause" hearing the District Court ridiculed the plain meaning of its own instructions and refused to allow Anderson to have any type of meaningful hearing as to why he refused to answer certain questions. In fact, the "just cause" hearing – a far cry from the meaningful, adversarial process required

by law – devolved into a parlor game moderated by the District Court. This hearing – "just cause" in name only – could more aptly have been titled, "Don't read my lips, read my mind." Unfortunately for Mr. Anderson, neither he nor his attorneys have telepathic powers.

The District Court claimed an interpretation of its unequivocal three previous orders which no reasonable person could have ever discerned from the record. When confronted with this seemingly nonsensical interpretation, the District Court claimed to have viewed television accounts of interviews of Mr. Anderson. Besides the basic fact that the court's reliance on these alleged interviews would have been improper, since these they were not in evidence, more galling still is the fact that these interviews do not exist. MR. ANDERSON HAS NEVER GIVEN AN INTERVIEW, WRITTEN , TELEVISION, RADIO OR OTHERWISE. [1] As if relying on nonexistent "news reports" not in evidence wasn't bad enough, the District Court then *sua sponte* took judicial notice of the book *Game of Shadows* as evidence purportedly supporting its contempt ruling. The District Court's rejection of the express language of its own repeated orders,

---

[1] As was written that day by one of reporters present for this "hearing": "...none of the reporters there, from all manner of media outlet, can remember the famously silent Anderson ever saying "boo" to cameras or reporters with notebooks.". http://abclocal.go.com/kgo/story?section=sports&id=4505594

the Court's reliance on inadmissible and, indeed, nonexistent evidence requires reversal. Moreover, the District Court's expressed rationale for its contempt order shows that the District Court improperly intended that Mr. Anderson's confinement be punitive rather than coercive.

Finally, Mr. Anderson reasserts and incorporates by this reference his arguments made in his prior appeal, *In re: Grand Jury Proceedings (Anderson)*, Ninth Circuit Case Number 06-16215 (the "First Appeal"), as this Court permitted in its order of July 28, 2006.

IV. STATEMENT OF THE CASE AND STATEMENT OF FACTS

A. PROCEEDINGS REGARDING THE FIRST APPEAL.

Regarding the general background of this case, and in an effort to avoid repetition, Mr. Anderson incorporates here by this reference the Statement of the Case and Statement of Facts from the Appellant's Opening Brief in the First Appeal.

A fundamental issue underlying both this case and the First Appeal was the contents of a recording alleged to include statements of Mr. Anderson. This recording was referred to as the "Paragraph 8" recording, after the government's redacted declaration paragraph in which the recording was described. Neither that

recording, nor its description, have ever been disclosed to Mr. Anderson even though the Government finally admitted that they had possession of the tape prior to Mr. Anderson's plea in the matter, which obviously made the tape Rule 16 material. In spite of this the Government never turned it over and continue to refuse to turn over this tape to this day. Their express rationale for the obvious Rule 16 violation is that they were negotiating a plea agreement at that time. Counsel for Mr. Anderson is unaware of any Rule 16 exception for "Government is in final throes of plea agreement negotiation".

At the July 5, 2006 hearing before the District Court, Judge Alsup stated that the recording was not a wiretap, but did not specifically determine whether the government had obtained the recording legally. (ER 21.)

The judge's ruling, however, left a fundamental problem. Because the defense was not privy to the recording, nor to the other evidence that the government allegedly possessed, both Mr. Anderson and his attorney were left in the impossible position of having to guess at what questions were derived solely or partly from the tape and which questions may have been derived from other sources.[2] After defense counsel raised this issue on June 29, Judge Alsup

---

[2] The United Supreme Court has eloquently explained why even this procedure was flawed and instead the tape should have been produced to Mr. Anderson prior to any hearing on taint:

provided his solution:

> Now this court is going to order Mr. Anderson to go to the Grand Jury room and respond to questions. If Mr. Anderson thinks the government has violated what it has told me it is going to do it on a question-by-question basis, then I invite Mr. Anderson, if it's in good faith and there is an objective basis for believing that, to come back in here and explain why he shouldn't have to answer that question, based on the fact the Government has said that's off the table.

(6-29-06 RT 71.)

On July 5, Judge Alsup reiterated what he meant by that instruction:

> So I then directed the witness to go back in the Grand

"An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on the in camera judgment of the trial court to identify those records which might have contributed to the Government's case."
Alderman v. United States, 394 U.S. 165, 192 (1969)

> Jury, answer questions. And if he in good faith felt there was a question that was possibly derived from that tape, then you can come back here, and we rule on whether or not that particular question was tainted by the tape. And which, even though it has not been proven to be illegal in any respect, I am prepared to assume on the Government's mode of operating that we would treat it as if it had been, if it deserved taint. So we would do that question by question.

(ER 22.)

A few seconds later, for the third time, the District Court again stated, "[s]o I think that the idea of trying to have a hearing to prove up taint is fine on a question-by-question basis." (ER 22.)

That same day, the District Court found Mr. Anderson in contempt, and ordered him confined, giving rise to the First Appeal. Mr. Anderson was released from custody with the expiration of the grand jury's term and this Court dismissed the First Appeal as moot on July 28, 2006.

///

///

B. PROCEEDINGS REGARDING THE JULY 19, 2006 GRAND JURY SUBPOENA.

After his release, Mr. Anderson was served with another grand jury subpoena, dated July 19, 2006 (the "July 19 Subpoena"), requiring his attendance on July 27. Mr. Anderson's lawyer, Mark Geragos, was engaged in trial on that date, and requested of the government a two-week extension of time, which the government refused. Mr. Anderson made an ex parte application to the District Court for an extension of time, which the District Court denied.

Mr. Anderson appeared before the grand jury on July 27 with Matthew Geragos, a colleague of his attorney Mark Geragos, but declined to answer questions because his attorney was not present. After a summary hearing, the District Court ordered Anderson to return to the grand jury and answer questions. Mr. Anderson returned to the grand jury, but declined to answer questions on the same grounds. The District Court then set a hearing for an order to show cause regarding civil contempt for August 17, 2006. (RT of July 27, 2006, *passim*.)

On that date, Mr. Anderson again appeared before the grand jury. Mr. Anderson answered a series of questions regarding whether he possessed documents responsive to the subpoena. (ER 56-64.) Mr. Anderson answered approximately (50) fifty questions. He provided his name, address, profession, confirmed that he had been served with the Grand Jury subpoena, confirmed his

awareness and that he had been served with a copy of the immunity order. Mr. Anderson answered a series of questions indicating that he did not possess any invoices, schedules, calendars, records of drugs provided and administered, financial records, checkbooks, bank statements, or anything else to provide to the Grand Jury. When asked why that was by the Assistant United States Attorney, Mr. Anderson replied: "I don't have anything. You guys have it all." (ER 63-64.) The questioning then went as follows:

So in the time frame between those two dates, has there by anything generated –

A. No.

Q. – with regards to these individuals?

A. Oh, no.

Q. Okay. Any notes?

A. No.

(ER 64)

The government then posed another question which Mr. Anderson declined to answer them on the grounds that he believed they were derived from the Paragraph 8 recording:

Q. Okay. We're back on the record.

I'd asked you whether you had any correspondence, letters, or e-mails regarding any of those individuals.

A. I decline to answer that question on the grounds that the leak investigation of the grand jury is still ongoing, my plea bargain with you did not require any cooperation, and the question is a product of an illegal wiretap.

Q. Okay. Now, these are the same reasons that you gave for refusing to answer before the prior grand jury. Is that correct?

A. I decline to answer that question on the grounds that the leak investigation of the grand jury is still ongoing, my plea bargain with you did not require any cooperation, and the question is a product of an illegal wiretap.

Q. And, in fact, Judge Alsup decided that issue after litigation and, in fact, said those were not legitimate issues for you to refuse to answer. Do you remember that?

A. I'm not really understanding that because I didn't have a lawyer here at the time.

Q. Well, you did have a lawyer. Mr. Mark Geragos was with you in the courtroom before Judge Alsup – not before Judge White – before Judge Alsup when this particular issue on these questions was litigated.

Do you recall that?

A. Not enough to answer that.

Q. So you don't recall that the judge ordered you, after hearing your lawyer's arguments, Mr. Mark Geragos's arguments on those reasons, you don't recall the judge ordering you to testify?

A. I guess I'll have to talk to my attorney to make sure I answer that correctly.

Q. So, Mr. Anderson, you said you wanted to speak to your attorney.

Do you have an answer?

A. Yeah. What I understand is I made a deal with you that I did not have to cooperate. In addition, you can't guarantee that what is said in here stays in here, and lastly, Judge Alsup, from what I understand, did not say what you're saying about the illegal tape.

Q. Okay. So is it your intent to refuse to answer based on those reasons?

A. I can only answer what I understand. That's all I can do.

(ER 65-67.)

Rather than make a determination, consistent with his July 5 order, reiterated three separate times, whether the disputed questions could have arisen from the Paragraph 8 recording, District Judge Alsup set a hearing for an order to show cause regarding civil contempt for August 28.

C. THE AUGUST 28 HEARING AND CONTEMPT ORDER.

At the August 28th hearing, the defense submitted a declaration by Mr. Anderson's prior lawyer stating that it was his understanding that Mr. Anderson's plea agreement barred his testimony before the grand jury. (ER 95-98.) The District Court, however, rejected that argument, and did not permit Mr. Serra to be called as a witness. (RT 8-28-06 37-38.)

The defense then argued that it was entitled to a question-by-question analysis, consistent with Judge Alsup's order of July 5. Judge Alsup, however, denied that he had made such an order:

> [T]he Court was surprised to hear Mr. Geragos say that he thought that this was not going to be a hearing under 1826(a), but rather, it would be some other form of hearing where we would come back after each question and have a new order to either answer or not answer, and that this Court would have to be involved just -- on a question-by-question basis, on whether or not the Witness would answer it.
>
> What the Court previously ordered and thought was very clear was that if he went into the Grand Jury

> room and had a good-faith basis to believe and an objective basis to believe that a particular question was tainted by that Paragraph 8 tape, then he could refuse to answer, come back here, but he was at his peril. If he was wrong, he would go into custody. If he was right, then he would be vindicated. I think that is the only plausible way to read the transcript. So, the Court overrules Mr. Geragos's creative interpretation.

(8/28/06 RT 41.)

Moreover, in making its determination that the questions at issue were not derived from the Paragraph 8 recording, Judge Alsup explicitly relied on unspecified press reports not in the record, and took judicial notice of the book *Game of Shadows*:

> THE COURT: I'll just tell you what bothers me. A lot of things bother me. **There's a wealth of evidence, including a book out there called Game of Shadows.** Any one of those questions could have been based on just reading the book, period....

(8/28/06 RT 9.)

THE COURT: He injected Barry Bonds with steroids, is that a mistake, too?

MR. GERAGOS: That clearly, I believe, came from the -- the tape.

THE COURT: It's right in the book. It's in the book.

MR. GERAGOS: Well, the book isn't what was --

THE COURT: It's in the book.

(8/28/06 RT 10.)

How can you say that there is a taint from that tape recording **when there is a wealth of stuff in the public domain saying that your client inject steroids into Barry Bonds?**

MR. GERAGOS: Well, I don't know what you -- the Court is basing that on. Why does the Court have -- **Game of Shadows is not a piece of evidence in this case.**

THE COURT: **Doesn't matter. I'm taking judicial notice of all of that.** I'm taking judicial notice that this – this is a question that half of America who follow this

type of thing is asking, and to say that that was all based on this tape recording that some -- somebody made that wasn't even a police officer, I don't think that that's tape -- taint.

(8/28/06 RT 16.)

THE COURT: **If your client goes out there and gives press releases where it says "It doesn't matter what my lawyer says, I'm not going to answer these questions anyway."**

MR. GERAGOS: **He's never done that.**

THE COURT: Yes, he has.

MR. GERAGOS: He's never done that.

THE COURT: I've seen it on TV.

MR. GERAGOS: Well, then, I'm going to tell you, do you believe everything you see on TV? Because he's never done it.

THE COURT: I've seen him on TV, and I've seen --

MR. GERAGOS: He's never, --

THE COURT: -- on TV.

MR. GERAGOS: -- he's never been on TV saying that.

So, I don't know where you saw it.

(8/28/06 RT 17-18.)

Ultimately, the District Court rejected Mr. Anderson's arguments on just cause, and ordered him confined. Judge Alsup, however, acknowledged that he did not believe Mr. Anderson would testify, despite the confinement order:

> But, I want to say this, that I have seen those statements in the press. And I think that Mr. Geragos and Mr. Anderson are putting upon the system and playing a game with the system, where they know he is never going to answer these questions -- I won't say "never" because the whole purpose of the detention is to get him to change his mind, but absent that, he says he's not going to answer these questions.

(8/28/06 RT 42:5-10.)

Judge Alsup ordered Mr. Anderson confined. (ER 103.) This appeal followed. (ER 104-05.)

///

///

V. ARGUMENT

A. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR HOLDING MR. ANDERSON IN CONTEMPT DESPITE MR. ANDERSON'S COMPLIANCE WITH THE DISTRICT COURT'S JULY 5 ORDER.[3]

Mr. Anderson acted in full compliance with the District Court's order of July 5, 2006, that he could object to questions that he believed may have been derived from the Paragraph 8 recording, and have the issue determined by the court on a case-by-case basis. Judge Alsup, however, denied the clear meaning of that order, found Mr. Anderson in contempt and ordered him confined. That was improper, illegal, erroneous, and abusive.[4]

It is black-letter law that in contempt cases, the court's orders are to be construed strictly and narrowly. To support a finding of contempt, the order allegedly violated must be clear an unambiguous. *In re Weiss*, 703 F.2d 653, 660 (2nd Cir. 1983).

"It is well established that before one may be punished for contempt for

---

[3]Mr. Anderson incorporates by this reference the arguments he made in his briefs filed in the First Appeal.

[4]Because the issues raised by Mr. Anderson appear to involve either questions of law or mixed questions of law and fact, the issues are subject to *de novo* review. *Smith v. Salt River Project*, 109 F.3d 586 (9th Cir. 1997).

violating a court order, the terms of such order should be clear and specific, and leave no doubt or uncertainty in the minds of those to whom it is addressed." *McFarland v. United States*, 295 F. 648, 650 (7th Cir. 1923); *United States v. DeParcq*, 164 F.2d 124, 126 (7th Cir. 1947). Failure to take action required by an order can be punished only if the action is clearly, specifically, and unequivocally commanded by that order. *United States v. Fleischman*, 339 U.S. 349, 370-371, 94 L. Ed. 906 (1950). "Stated another way, it appears to be settled law that contempt will not lie for violation of an order of the court unless the order is clear and decisive and contains no doubt about what it requires to be done." *Traub v. United States*, 98 U.S. App. D.C. 43, 232 F.2d 43, 47 (1955).

Here, the District Court's instructions to Mr. Anderson were clear: if Mr. Anderson thought the government was asking a question based on the recording, he could come back to the court and have a taint hearing. Judge Alsup repeated the substance of this order three times.

Judge Alsup's August 28 "interpretation" of his July 5 order bears no resemblance to the original. He prohibited Mr. Anderson from making any argument regarding whether the questions could have been derived from the Paragraph 8 recording, and asserted that his objections were "at his peril," in contradiction to his prior directions. This was nothing more than a judicial "bait

and switch." It is a manifest injustice when the liberty of an American citizen is involved. Judge Alsup was obligated to hold a genuine, meaningful, evidentiary hearing regarding Mr. Anderson's objections, according to the procedures he had established on July 5. Mr. Anderson's conduct was not contemptuous, and the order below must be reversed.

B. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR RELYING ON MATTERS OUTSIDE THE RECORD, AND BY IMPROPERLY TAKING JUDICIAL NOTICE OF THE BOOK *GAME OF SHADOWS*.

Despite prior assurances that Greg Anderson and the defense would be allowed a question-by-question ruling on whether he had good cause to not answer a question, Judge Alsup refused to allow the good cause hearing to go forward . Instead, the Court accused Anderson and the defense of not having a good-faith belief for refusing to answer the questions. The Court based these accusations not on any actual evidence presented, but rather by taking judicial notice of a book[5]–

[5] Ironically, the Court has taken judicial notice of a book whose sources the authors have refused to reveal and have had their motion to quash denied by a Court in this same District. USA v. Fainaru-Wada et al. U.S. District Court, California Northern District (San Francisco) Criminal Docket for Case #: 3:06-xr-90225-JSW-1

an extremely questionably sourced book – that the court purports not to have even read; and secondly by having supposedly seen Mr. Anderson on television making inflammatory statements – an assertion that is provably false.

Since the defense was not allowed to hear the tape nor was it made aware of the contents, it presented the dilemma of Anderson and his attorney having to "guess" at what questions may have been derived from the tape. Recognizing this problem, the Court offered the defense a solution - if at any time Anderson had a good-faith belief that a question was derived from the recording, he could go back in front of the Court on a "question-by-question" basis and be allowed to be heard.

However, upon exercising that right and returning to Judge Alsup to be heard, Anderson and his attorney found that the Court had reversed itself. Specifically, the Court concluded that, based upon the book *Game of Shadows* and supposed press releases and television appearances, none of which were in the record, Anderson did not have a good-faith belief to refuse to answer the questions.

It is black-letter law that the trier of fact may not base its rulings on matter outside of the evidence. *Sassounian v. Roe* 230 F.3d 1097, 1108-09 (9th Cir. 1999). Here, Judge Alsup specifically asserted that he was basing his contempt order on unspecified reports in the press, unspecified hearsay statements regarding Mr.

Anderson, and unspecified television reports that the judge claims to have viewed.

The district court's reliance on media reports of what Mr. Anderson supposedly said about his testimony is preposterous. There was no evidence introduced that confirmed or corroborated the district court's assertion that Mr. Anderson made such statements to the media. Nor was there any evidence introduced to confirm the accuracy of the so-called media reports that the district court relied upon. In fact, the media reports confirm the opposite – that Mr. Anderson never made any such statements or comments to the media. The court's reliance on media reports that Mr. Anderson supposedly made statements regarding his refusal to testify was erroneous as a matter of law and wrong as a matter of fact.

Nor can the contents of the book *Game of Shadows* be judicially noticed. Rule 201 of the Federal Rules of Evidence provides that:

> (b) A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

The District Court provided no explanation of how the contents of that book, written by two journalists under investigation for grand jury secrecy violations, are judicially noticeable. Nor did the District Court even explain what specific portions of that book he was relying upon. In any event, there is nothing in the record that would give any person any confidence that the portions of the book Judge Alsup was relying upon did not in fact themselves come from the Paragraph 8 recording. After all, that is precisely – according to the Government – why the journalists are being called as witnesses in the leaks investigation. Just because the leaks of illegally obtained recordings enter the public arena does render what was previously inadmissible now admissible.

Under no stretch of the imagination can a hearing held under these circumstances be deemed to have been fair to Mr. Anderson. The "evidence" that the District Court relied upon in ruling that the questions asked of Mr. Anderson did not come from the Paragraph 8 recording was not "evidence" at all. Mr. Anderson was not given any of the supposed "evidence" relating any supposed statements he had made. This was not in any way a meaningful adversary proceeding, and it was improper for the District Court to confine Mr. Anderson on this record. Mr. Anderson was and is entitled to an "uninhibited adversary hearing," including the calling and examination of witnesses relevant to his

defenses. The leading case in the Ninth Circuit on this issue is *U.S. v. Alter*, 482 F.2d 1016, 1024 (9th Cir. 1973), wherein this court stated:

> [T]he hearing Alter received was not the "uninhibited adversary hearing" contemplated by section 1826(a). The hearing was largely confined to the perfunctory reception of affidavits, a round of oral argument, and some offers for the record. That "uninhibited adversary hearing" ... requires, at the very least, that a witness be allowed to probe all non-frivolous defenses to the contempt charge. The constitutional guarantee of due process of law means more than a silhouette of justice; it requires that judicial determinations affecting the freedom of the individual be openly arrived at after full, fair, and vigorous debate on both sides of all substantial issues.

U.S. v. Alter, 482 F.2d 1016, 1024 (internal quotation marks and citations omitted).

Mr. Anderson had substantial and genuine defenses to the government's motion to hold him in contempt and clearly made a clear and convincing showing of just cause. Mr. Anderson did not receive due process of law, but rather a mere "silhouette of justice" before being incarcerated.

C. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY ORDERING CONFINEMENT AS PUNISHMENT RATHER THAN COERCION.

Confinement for civil contempt must not be for the purpose of punishment, but is only permissible to coerce compliance. *See Shillitani v. United States*, 384 U.S. 364, 369-370 (1966); *International Union v. Bagwell*, 512 U.S. 821, 827,

(1994) [purpose behind civil contempt is to secure testimony, not punish witness by imprisonment].

Here, the District Court is confining Mr. Anderson to punish him. Judge Alsup acknowledged that he did not believe Mr. Anderson would ever answer substantive questions posed by the grand jury:

> But, I want to say this, that I have seen those statements in the press. And I think that Mr. Geragos and Mr. Anderson are putting upon the system and playing a game with the system, where they know he is never going to answer these questions -- I won't say "never" because the whole purpose of the detention is to get him to change his mind, but absent that, he says he's not going to answer these questions.

(8/28/06 RT 42.)

If, as the District Court believes, Mr. Anderson will not provide substantive testimony regardless of his confinement, the confinement order can be of no coercive effect. The only purpose for confining Mr. Anderson would be punitive. That is an impermissible use of civil contempt.

/ / /

D. MR. ANDERSON HAD JUST CAUSE TO REFUSE TO TESTIFY BECAUSE THE GOVERNMENT VIOLATED HIS PLEA AGREEMENT BY ATTEMPTING TO COMPEL HIS TESTIMONY.

Although Mr. Anderson incorporates his argument on this point from the First Appeal, for the August 28 hearing he submitted additional evidence, namely the declaration of his original attorney, J. Tony Serra. That declaration provided substantial evidence that the demand by the government for Mr. Anderson to testify violated the agreement entered into by Mr. Anderson and the United States Attorney's Office. At the very least, the District Court should have allowed Mr. Serra to testify.

Mr. Serra's declaration provided substantial support for Mr. Anderson's argument that his plea agreement freed him from any obligatin to provide testimony:

> Ultimately, the Government tendered the plea agreement that was signed in that case. At the time the plea agreement was tendered by the Government to me for review, it was represented to me and I in turn told Mr. Anderson, that entering into this plea agreement would bring to a close his involvement in all matters related to

the Balco investigation. [¶] At no time did any Assistant U.S. Attorney disclose to me that there was any possibility that Greg Anderson would be subpoenaed to testify in any related proceeding. [¶] At no time did the Government disclose, during the many plea negotiations, that refusal to cooperate with the Government does not guarantee immunity from grand jury subpoenas. [¶] Had the government told me that issuance of a subpoena in a related proceeding to Mr. Anderson was even a possibility, I would have informed him thereof. I believe had that been represented to him, he would not have entered into this plea agreement. The benefit of the plea agreement to Mr. Anderson was final resolution of all matters relating to him as it related in any way to Balco. The Government's own actions, unrelated even to plea negotiations, supported this perception, i.e., all athletes' names were redacted from the Indictment, the Search Warrant Affidavits, and the Government pleadings. This was the Government's choice.

(ER 96.)

The district court erred by denying Mr. Anderson his right to call Mr. Serra on this issue and ruling that the compelled testimony did not violate his plea agreement.

VI. CONCLUSION

For the foregoing reasons, Mr. Anderson respectfully requests that the Court vacate the district court's order finding him in civil contempt and remand the matter with appropriate directions.

Dated: September 13, 2006

Respectfully submitted,

GERAGOS & GERAGOS
A Professional Corporation

By: _____
MARK J. GERAGOS
Attorneys for Appellant
GREG FRANCIS ANDERSON

STATEMENT OF RELATED CASES

Appellants are unaware of any cases related to this matter.

RULE 32(a)(7) CERTIFICATE

The applicable portions of this brief are proportionately spaced, has a typeface of 14 points or more, and contains5,630 words, and were otherwise prepared in compliance with 9th Cir. R. 32 and Form 8.

Dated: September 13, 2006

Respectfully submitted,

GERAGOS & GERAGOS
A Professional Corporation

By: _____
MARK J. GERAGOS
Attorneys for Appellant
GREG FRANCIS ANDERSON

PROOF OF SERVICE

STATE OF CALIFORNIA
} ss.
COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 350 South Grand Avenue Suite 3900, Los Angeles, California 90071-3480.

On September 13, 2006, I served the foregoing document, described as **APPELLANT'S OPENING BRIEF** on all interested parties in said action by:

☒ BY ELECTRONIC-MAIL from HAKOPIAN@GERAGOS.COM to:

matthew.parrella@usdoj.gov
jeff.nedrow@usdoj.gov
jeffrey.finigan@usdoj.gov

☒ VIA FEDERAL EXPRESS as follows:

☐ placing a true copy thereof in a sealed envelope addressed as stated on the ATTACHED MAILING LIST.

☒ placing ☐ the original ☒ a true copy thereof enclosed in a sealed envelope addressed as follows:

Jeffrey D. Nedrow
Assistant United States Attorney
150 Almaden Boulevard, Suite 900
San Jose, California 95133

☐ BY PERSONAL SERVICE as follows:

I delivered such envelope by hand to the offices of the addressee.

☐ STATE - I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ FEDERAL - I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on September 13, 2006, at Los Angeles, California.

Mary J. Hakopian